

## German Products Liability Law and the Impact of the EC Council Directive†

On July 25, 1985, the Council of the European Communities (EC) passed the Council Directive on the harmonization of products liability laws in the EC Member States.<sup>1</sup> This Council Directive must be transformed into national law, i.e., the member states will have to adopt the laws and regulations necessary to comply with the directive,<sup>2</sup> by August 1988. Products put into circulation on or after the date of enactment of national provisions will be subject to the Council Directive.<sup>3</sup> The most remarkable

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1. 28 O.J. EUR. COMM. (No. L 210) 29 (1985) [hereinafter CD]. See generally Dielmann, *The European Economic Community's Council Directive on Products Liability*, 20 INT'L LAW. 1391 (1986); Schlechtriem, *Die EG-Richtlinie zur Produkthaftung*, 34 VERSICHERUNGSRECHT [VERSR] 1033-43 (1986); von Marschall, *Zur Richtlinie des Rates der Europaischen Gemeinschaften vom 25.07.1985*, 32 AKTIENGESELLSCHAFT [AG] 97 (1987); Bodewig, *Die kuenftige Produzentenhaftung in Deutschland*, 32 GEWERBLICHER RECHTSCHUTZ UND URHEBERRECHT—INTERNATIONALER TEIL [GRUR INT.] 780 (1985); Hollmann, *Die EG-Produkthaftungsrichtlinie*, 38 DER BETRIEB [DB] 2389, 2439-43 (1985); Taschner, *Die kuenftige Produzentenhaftung in Deutschland*, 39 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 611 (1986); H. TASCHNER, *PRODUKTHAFTUNG* (1986). More recently, cf. Hollmann, *Zum Stand der Umsetzung der EG-Produkthaftungsrichtlinie*, 34 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 81 (1988); Opfermann, *Der neue Produkthaftungsentwurf*, 9 ZEITSCHRIFT FUER WIRTSCHAFTSRECHT [ZIP] 462 (1988). For detailed comments on the Council Directive, see Lorenz, *Europaische Rechtsangleichung auf dem Gebiet der Produzentenhaftung* . . . , 151 ZEITSCHRIFT FUER DAS GESAMTE HANDELS-UND WIRTSCHAFTSRECHT [ZHR] 1 (1978); 1 J. SCHMIDT-SALZER & H. HOLLMANN, *KOMMENTAR EG-RICHTLINIE PRODUKTHAFTUNG* 120-126 (1986).

2. CD art. 19(1).

3. CD art. 2 defines the term "product" as follows: "For the purpose of this Directive 'product' means all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable. 'Primary agricultural

feature of the new law is the concept of no-fault (strict) liability, which, apart from a few statutory exceptions, has been unknown to the laws of the EC member states.<sup>4</sup> Not surprisingly, the introduction of a manufacturer's strict liability for defective products was highly controversial in the EC member states.<sup>5</sup> A uniform products liability law on the EC level was equally doubtful.<sup>6</sup>

With regard to the Federal Republic of Germany, however, all legislative steps have been taken for the implementation of the Council Directive. The ratification of the German draft code by parliament has to be anticipated by June 1988. The new German Product Liability Act (*Produkthaftungs-gesetz*) will enter into force on August 1, 1988.<sup>7</sup> This article describes German products liability law at present, *i.e.*, prior to the Products Liability Act, and examines to what extent differing standards will govern after implementation of the Council Directive.<sup>8</sup> The Council Directive will not replace, but rather supplement, the already existing products liability law of the EC member states.<sup>9</sup> In other words, to the extent that present West German law provides for more stringent standards, such standards will continue to prevail.

Under German law, products liability (*Produkthaftung* or *Produzenten-haftung*) in the broad sense encompasses both contract and tort law. Products liability law aiming specifically at the production of users and bystanders *without* contractual relations to the manufacturer has been developed by case law on the basis of tort law. Measured by these standards, the Council Directive qualifies as tort liability, since no contractual relationship is required.<sup>10</sup>

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products' means the products of the soil, of stock-farming and of fisheries, excluding products which have undergone initial processing. 'Product' includes electricity.' CD art. 15(1) allows the EC member states also to include "primary agricultural products and game."

4. J. SCHMIDT-SALZER & H. HOLLMANN, *supra* note 1, at 105-12; *cf. infra* note 11 and accompanying text (Drug Act). *But see also* Lorenz, *supra* note 1, at 5-6 (French law as one "source d'inspiration" for the Council Directive).

5. *See* Hollmann, *Die EG-Produkthaftungsrichtlinie (I)*, 1985 DER BETRIEB [DB] 2389, von Huelsen, *Products liability*, in *DOING BUSINESS IN GERMANY* § 38.09 (B. Ruster ed. 1986 supp.).

6. J. SCHMIDT-SALZER & H. HOLLMANN, *supra* note 1, at 120-21; Dielmann, *supra* note 1, at 1392.

7. Section 18 of the draft code of the German Ministry of Justice [hereinafter German draft code] published in June 1987, *reprinted*, with official comments, in *PRODUKTHAFT-PFLICHT INTERNATIONAL* [PHI] 99 (Sonderdruck ed. 1987), provides for a separate act with eighteen articles. The new German law will enter into force on August 1, 1988. *See also* Schmidt-Salzer, *EG-Richtlinie Produkthaftung: Der Entwurf fuer das Deutsche Transformationsgesetz*, 42 *BETRIEBS-BERATER* [BB] 1404, 1407-11 (1987); Hollmann, *supra* note 1 (report on the state of transformation in the other Member States).

8. Bruening-Brinkmann, *Die EG-Produkthaftpflicht-Richtlinie-Neue Risiken fuer den Hersteller?*, 1986 PHI 78-81; J. SCHMIDT-SALZER & H. HOLLMANN, *supra* note 1, at 116-17; *cf.* Diederichsen, *Wohin treibt die Produzentenhaftung?*, 31 *NJW* 1282, 1291 (1978).

9. J. SCHMIDT-SALZER & H. HOLLMANN, *supra* note 1, at 803-10.

10. *Id.* at 99-103.

## I. Close-to-Strict and Strict Liability in Tort

In principle, under present German law, products liability in tort is liability for negligence. In practice, however, the respective case law of the German Federal Supreme Court has developed a close-to-strict liability for defective products. The court, on the one hand, intensified the manufacturer's duty of care, and, on the other hand, substantially reduced the burden of proof of the user harmed by a defective product.<sup>11</sup> As a statutory exception, Section 84 of the Drug Act (*Arzneimittelgesetz*) provides for strict liability of drug manufacturers.<sup>12</sup> The Council Directive, in principle, introduces the concept of strict products liability. It does not, however, provide for pure strict liability, since Article 7 allows a manufacturer to exonerate itself to some extent.<sup>13</sup>

### A. STATUTORY BASIS OF PRODUCTS LIABILITY IN TORT

The manufacturer's liability is based in most products liability cases on the German Civil Code (BGB) section 823 creating liability for any willful or negligent act or omission causing harm to a person's life, health or tangible property. Additionally, section 823 of the BGB creates liability in case of a willful or negligent violation of a statutory provision specifically designed to protect others (*Schutzgesetz*), such as statutory safety standards for technical or mechanical equipment.<sup>14</sup> A plaintiff harmed by a defective product may base a claim for damages on both provisions and, in the future, also on the new Products Liability Act.<sup>15</sup>

### B. MANUFACTURER'S DUTY OF CARE AND THE CONCEPT OF PRODUCT DEFECT

The basis of products liability under German tort law is a violation of the duty of care that a manufacturer is supposed to observe with regard to the design and manufacture of the product, and instructions and warnings directed at the user; in short: negligence or fault. Under the Council Directive's concept of strict liability, a defective and unsafe product causing harm to its user is per se a sufficient basis for the manufacturer's liability. Pursuant to Article 6(1) of the Council Directive a product is defective "when it does not provide the safety which a person is entitled

11. The leading case is Judgment of Nov. 26, 1968, Federal Supreme Court in Civil Matters (Bundesgerichtshof), W. Ger., 51 Official Reporter [BGHZ] 91 (1969).

12. Bundesgesetzblatt, Teil I [BGBl.I] 2445 [hereinafter Drug Act]; the amount of damages is limited to DM 500,000 or annuities of DM 30,000 for death or injury of a single person and to DM 200,000,000 or annuities of DM 12,000,000 for death or injury of more than one person. Drug Act § 88.

13. CD art. 7; see *infra* text section I.B.2.

14. See *infra* text section I.B.1.

15. CD art. 13; German draft code § 15(2).

to expect, taking all circumstances into account. . . .” The German courts have not as yet applied this definition, which still leaves room for the introduction of fault elements (“all circumstances”). The concept of user or consumer expectations embodied in Article 6(1) is, to some extent, interrelated with the manufacturer’s duty of care.<sup>16</sup> Therefore, while the litigation focus will clearly shift to user expectations, the existing categories of design defects, manufacturing defects, and instruction defects<sup>17</sup> are likely to retain their importance.

### 1. *Design Defects (Konstruktionsfehler, Entwicklungsfehler)*

The manufacturer is obliged to design its product or have it designed in a way that will permit its use by an average user without any unnecessary risk. A defect in design, therefore, exists when, during the design and the testing phase, a mistake is committed that results in the product having a characteristic that later causes harm. The design is defective whenever the mistake was avoidable under existing scientific and technical knowledge. The extent and standard of the manufacturer’s respective duty of care depends on various factors, including the type of average user, the ordinary and extraordinary conditions of use, and specific dangers emanating from the product.

The standards for the manufacturer’s duty of care may be specified by administrative law provisions.<sup>18</sup> For example, according to the Federal Law for the Safety of Technical Equipment (*Geraetesicherheitsgesetz-GSG*) of June 24, 1968,<sup>19</sup> technical equipment sold in Germany must meet certain standards. The term “technical equipment” is construed quite broadly. Not only does the term include technical equipment used at the workplace (e.g., circular saws) or in households (e.g., electric knives), but also safety devices (e.g., safety belts, life vests, oxygen masks), sports equipment, and toys.<sup>20</sup> Section 3(1) of the GSG describes the standards that must be met as follows:

The manufacturer or importer of technical equipment may only sell or present for sale such equipment, if it is in accordance with the generally recognized technical principles and rules (*allgemein anerkannte Regeln der Technik*) and

16. Lorenz, *supra* note 1, at 23. Bruggemeier & Reich, *Die EG-Produkthaftungs-Richtlinie 1985 und ihr Verhaeltnis zur Produzentenhaftung nach § 823 Abs. 1 BGB*, 1986 WERTPAPIER MITTEILUNGEN [WM] 149, 150; J. SCHMIDT-SALZER & H. HOLLMANN, *supra* note 1, at 540 ff.; see also Hollmann, *supra* note 5, at 2392.

17. Cf. Lorenz, *supra* note 1, at 21.

18. For details, see I H. KULLMANN & B. PFISTER, *PRODUZENTENHAFTUNG* ¶ 1520/31–43 (1987 supp.).

19. BGBl.I 717 (1968), as amended Feb. 18, 1986, BGBl.I 265 (1986) [hereinafter GSG]. Technical equipment for medical use is also governed by the GSG and additionally by the special provisions of the Regulation on the Safety of Technical Equipment for Medical Use (*Medizingeraeteverordnung*) (Jan. 14, 1985), BGBl.I 93 (1985).

20. GSG § 2(2); cf. H. SCHMATZ & M. NOETHLICH, *GERATESICHERHEITSGESETZ* ¶ 1125/5–7 (1980).

with the provisions for the safety of workplaces and prevention of accidents. It has to be designed in a way that users or third persons will, during the appropriate use of the equipment, be protected against any dangers to life and health as far as the appropriate use allows it. A deviation from the generally recognized technical principles and rules is allowed if the same safety is guaranteed by other means.

A legal definition of the term "*allgemein anerkannte Regeln der Technik*" does not exist. A technical rule is generally recognized if the experts in the field are convinced of and have documented its correctness.<sup>21</sup> The technical rules must be generally recognized in Germany. Differing standards prevailing abroad will not be considered. Deference is given to the rules and regulations edited by private institutions such as the Deutsches Institut für Normung (DIN).<sup>22</sup> In general, the sale of technical equipment in Germany does not presuppose a license certifying a product's conformity with section 3(1) of the GSG.<sup>23</sup> A manufacturer may obtain such a certificate of conformity (so-called "GS-Zeichen") on a voluntary basis, however. These certificates are issued by various officially recognized private institutions such as Technischer Ueberwachungs-Verein (TUV) or Verband Deutscher Elektrotechniker (VDE), some of which have branches abroad.

In a products liability lawsuit such a certificate of conformity will certainly improve the defendant's position and likely will prevent the plaintiff from arguing that the manufacturer negligently violated "generally recognized" technical principles and rules.<sup>24</sup> Nevertheless, "*allgemein anerkannte Regeln der Technik*" is not exactly identical with "state of the art" as used in a products liability legal analysis. State of the art includes new scientific discoveries that may not yet be "generally recognized," but nevertheless have to be considered by the manufacturer with regard to the design of a new product.<sup>25</sup>

According to Article 7(d) of the Council Directive, a manufacturer is not liable if it proves "that the defect is due to compliance of the product with mandatory regulations issued by the public authorities." How this provision, which has been embodied in section 1(2), no. 4 of the German draft code, will operate in practice is uncertain. One view argued is that

21. German Federal Supreme Court in Administrative Matters Judgment of Jan. 31, 1984, Bundesverwaltungsgericht [BVerwG], W. Ger., 39 BB 563 (1984).

22. Judgment of Jan. 17, 1984, Bundesgerichtshof [BGH], W. Ger., 35 VERSICHERUNGS-RECHT [VERS R] 270 (1984). For details see H. SCHMATZ & N. NOETHLICH, *supra* note 20, ¶ 135/4, 13.

23. *Id.* ¶ 1135/26-28.

24. *But see* Judgment of Dec. 11, 1979, BGH, 31 VERS R 380, 382 (1980).

25. Cf. H. KULLMANN & B. PFISTER, *supra* note 18, ¶ 1520/27. Also, a certificate of conformity does not prevent a plaintiff from invoking other categories of product defects such as manufacturing defects, failure to instruct or warn the user, or failure to call back defective products. See *infra* text section I.B.3-6.

a manufacturer who complies with mandatory provisions such as section 3(1) of the GSG including the provisions for the safety of workplaces and semiofficial rules and regulations (e.g., DIN) will be exonerated under Article 7(d) of the Council Directive. This argument could be particularly compelling with regard to technical equipment requiring a certificate of conformity (e.g., certain medical equipment).<sup>26</sup> More likely, provisions such as section 3(1) of the GSG will be considered as merely establishing minimum standards under administrative law, which will not necessarily be sufficient for purposes of products liability law.<sup>27</sup> Until a body of case law develops on the new Products Liability Act, a manufacturer is well-advised not to rely too heavily on Article 7(d), or the corresponding provision of the German draft code.

## 2. *Development Risks (Entwicklungsfehler)*

Under present German law, a manufacturer is not liable for one category of design defects: so-called development risks. Development risks are dangers inherent to the product that, considering the "state of the art" prevailing at the time the product is designed, tested, and put into circulation, are undetectable and unavoidable. Development risks constitute a product deficiency, but, as long as products liability is based on negligence, no design defect exists in the legal sense. For example, side effects of pharmaceuticals or cosmetics are sometimes, in spite of intensive testing, technically or scientifically not detectable.<sup>28</sup> Such development risks may become apparent through technological or scientific progress, or during the actual use of the product. In such case, the manufacturer may be under a duty to adequately warn users or even call back the shipped products.<sup>29</sup> A manufacturer is not liable for these design defects, however, because it did not act negligently.

Even under future law based on the Council Directive, the manufacturer can be exonerated for development risks. According to Article 7(e) of the Council Directive, a manufacturer will escape liability by showing "that the state of scientific and technical knowledge existing at the time he put

26. See H. SCHMATZ & N. NOETHLICH, *supra* note 20, ¶ 135/4, 13; J. SCHMIDT-SALZER & H. HOLLMANN, *supra* note 1, at 678-82.

27. See Official Comments to the German draft code, *supra* note 7, ¶¶ 2.1, 2.3, reprinted in PHI 104-05, 108-09 (Sonderdruck ed. July 1987); cf. Lorenz, *supra* note 1, at 12; see also BGH, Judgment of Oct. 7, 1986, BGH, 1987 DB 268 (laws and regulations concerning the duty to instruct the user (see *infra* text section I.B.5) provide only for minimum standards); Judgment of March 10, 1987, BGH, 1987 DB 1343.

28. Cf. Judgment of Feb. 13, 1975, BGH, 64 BGHZ 30 (1975) (tranquilizers for pregnant women led to birth defects in a great number of cases; the German legislature reacted by passing the Drug Act providing for strict liability). See *supra* note 12 and accompanying text.

29. See *infra* text section I.B.4-5.

the product into circulation was not such as to enable the existence of the defect to be discovered." This provision clearly contains fault elements contravening the concept of strict liability.<sup>30</sup> Member states can choose not to implement this provision.<sup>31</sup> The German Legislature, however, will not exercise its option of omitting Article 7(e).<sup>32</sup>

### 3. *Manufacturing and Quality Control Defects (Fabrikationsfehler)*

The manufacturer has the duty to organize its production process in such a way that the output of products deviating from the manufacturer's own specifications are kept at a minimum. The minimization of deviations can be achieved by making use of up-to-date machines, handling, and quality control. Work force mistakes must be kept at a minimum. The scope of necessary measures depends on the product and the state of the art of quality control in a given industry.<sup>33</sup> The general rule is: The greater the risk, the more precise and elaborate the precautions in production planning and control. When the likelihood of deficiencies in a certain production process is high, the quality control must be intensive. When the production process is intensively automated with a high degree of precision, the risk of products not complying with specifications is normally low. Therefore, the requirements for quality control may then also be lower.<sup>34</sup>

### 4. *Run-Aways (Ausreisser)*

If, despite elaborate and adequate precautions, a manufacturing defect occurs, the manufacturer is exonerated if it can prove that it fulfilled all its duties. A single defect is thus regarded as an unavoidable run-away (*Ausreisser*),<sup>35</sup> which under present German law does not trigger products liability claims. This situation will change, since the Council Directive does not allow exoneration for run-aways. In this respect, the Council Directive incorporates the concept of strict liability. The impact on present German products liability law will nevertheless remain moderate because, as experience shows, it is extremely difficult for a manufacturer to establish that a defective product was a run-away.<sup>36</sup>

30. Cf. J. SCHMIDT-SALZER & H. HOLLMANN, *supra* note 1, at 99.

31. CD art. 15(1)(b); the provision of CD art. 7(e) will be subject to review by the EC Council and Commission in 1995, CD art. 15(3); cf. Hollmann, *Die-EG-Produkthaftungsrichtlinie (II)*, 1985 DB 2439, 2442.

32. German draft code, *supra* note 7, § 1(2), no. 5, is identical with CD art. 7(e).

33. Von Huelsen, *supra* note 5, § 38.02[2].

34. Cf. Judgment of June 19, 1973, BGH, 28 BB 1372, 1373, (1973).

35. Term by von Huelsen, *supra* note 5, § 38.02[2].

36. See *infra* text section I.C.2.

### 5. *Instruction Defects—Failure to Warn (Instruktionsfehler)*

An instruction defect exists if (i) the directions for use are incomplete, inadequate, (ii) use of the product involves certain dangers, or (iii) the user may be exposed to side effects and no adequate warning is given. The instructions must be correct, precise, and understandable to the average user. The user must also be informed about the risks associated with any reasonably conceivable other use including normal abuse. The manufacturer has to take precautions that the warning reaches the actual user. To the extent feasible, warnings should be permanently and visibly affixed to the product.<sup>37</sup>

Under the new law, instruction defects fall into the category of product defects since the concept of product defects under Article 6 of the Council Directive incorporates circumstances such as “(i) the presentation of the product; (ii) the use to which it could reasonably be expected that the product would be put.” Naturally, as under present German law, the presentation of the product in advertising may become relevant for products liability.<sup>38</sup>

### 6. *Postmarketing Surveillance (Produktbeobachtung)*

The postmarketing surveillance duty of care arises after the product has been put into circulation. The manufacturer is obliged to monitor and observe the product's performance in actual use. The manufacturer is duty-bound to organize its business and marketing of the product in a way that provides timely notice in case damages occur or product characteristics appear that may cause serious damages.<sup>39</sup> In such events, additional warnings may be required or a duty to recall the product may arise.

In a recent decision, the German Federal Supreme Court (BGH) held that the postmarketing duty to observe a product, which normally is restricted to the manufacturer's own products, may also extend to a product's performance if it is combined with other manufacturers' products.<sup>40</sup> The decision concerns motor bike component parts produced by a manufacturer other than the motor bike manufacturer. The component parts had a destabilizing effect at high speed and led to a fatal accident. The court held that the motor bike manufacturer is obliged also not only to

37. Cf. Judgment of Oct. 20, 1959, BGH, 11 VERSR 342, 343 (1960); see also Judgment of Oct. 7, 1986, BGH, 1987 DB 268. For further references see H. KULLMANN & B. PFISTER, *supra* note 18, ¶ 1520/43–49.

38. See J. SCHMIDT-SALZER & H. HOLLMANN, *supra* note 1, at 597–602.

39. H. KULLMANN & B. PFISTER, *supra* note 18, ¶ 1520/49.

40. Judgment of Dec. 12, 1986, BGH, 40 NJW 1009 (1987).



observe the market for component parts, but if necessary, also to warn against the use of such parts in connection with its products.<sup>41</sup>

The Council Directive does not deal with the manufacturer's continuing duty to warn or recall the product. To ward off liability created by design and manufacturing defects, the manufacturer's interest is best served by continuously observing the product, and, if warranted, warn or recall the product. The situation is similar with regard to development risks. Even if Article 7(e) of the Council Directive is the basis for exoneration,<sup>42</sup> a manufacturer may still become liable by failing to warn the user adequately or call back the product after a development risk appears.<sup>43</sup> The tightening of the respective standards of care could indeed serve as a "back-door" approach to erode the practical importance of Article 7(e).

### C. BURDEN OF PROOF

The development of German close-to-strict products liability has been achieved by procedural means, namely by a gradual shifting of the burden of proof from the injured party (plaintiff) to the manufacturer (defendant). The general rule of evidence requires the plaintiff to prove:

- that the plaintiff was harmed and this injury was caused by the manufacturer's product;
- that the product was defective, *and*
- that the manufacturer was at fault, i.e., that it did not appropriately design and manufacture the product, and instruct and warn the user.

This rule is still in effect.<sup>44</sup> Case law, however, has continuously modified this general rule of evidence in favor of the plaintiff and partially shifted the burden of proof to the defendant. The Council Directive will not cause material changes.

#### 1. *Proof of Damage and Causation*

The plaintiff still carries the burden of proof that the complained of harm was caused by a defect in the defendant's product. Quite a number of products liability suits already end at this point.<sup>45</sup> The burden of proof is alleviated, however, by the admissibility of circumstantial evidence (*Beweisanzeichen* and *Anscheinsbeweis*). For example, if the circumstances of the occurrence of an accident allow the conclusion that the product was defective, such circumstantial evidence will be sufficient

41. *Id.* at 1010–11.

42. *See supra* text section I.A.2.

43. J. SCHMIDT-SALZER & H. HOLLMANN, *supra* note 1, at 624.

44. H. KULLMANN & B. PFISTER, *supra* note 18, ¶ 1526/2.

45. *Id.*, ¶ 1526/2–3, with reference to Judgment of Jan. 26, 1971, BGH, 22 VERSR 453 (1971).

proof; likewise, proof is sufficient if generally accepted experience warrants the conclusion that the accident would not have happened but for the product deficiency. For example, if a medical instrument breaks during surgery seven months after shipment, the breakage is sufficient circumstantial evidence for the existence of a product defect.<sup>46</sup> The defendant can still show that the accident may also have been caused by atypical events. Then the presumption created by the circumstantial evidence is rebutted, and the burden of going forward and, eventually, the burden of proof is again placed upon the plaintiff.<sup>47</sup>

## 2. *Proof of Fault*

Products liability in tort is fault liability.<sup>48</sup> As a result, the plaintiff must establish the manufacturer's negligence. If a plaintiff can prove that the product's deficiencies originated within the sphere of the manufacturer's business organization (*Organisationsbereich*), however, then the burden of proof with regard to fault shifts. The courts tend to assume such a shift of burden of proof if a plaintiff manages to prove violations of a protective law such as section 3(1) of the GSG.<sup>49</sup> Since the landmark decision of the German Federal Supreme Court in 1968,<sup>50</sup> such a shift of the burden of proof also applies in other products liability cases.

The defendant manufacturer has to prove that it did not act negligently: in other words, that it did not breach the duty of care that a manufacturer is supposed to observe and that, as a consequence, in spite of the defect and causation established by plaintiff, it was not at fault. The manufacturer may, for example, show that the deficiencies that caused the accident were due to development risks.<sup>51</sup> With regard to manufacturing and quality control defects,<sup>52</sup> manufacturers, as experience shows, almost always fail to carry the burden of going forward and to show that the deficient product is a run-away. Not only must the manufacturer prove that the organization, monitoring, and check system of the production process is without any gaps, but also that all the employees involved have been

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46. Judgment of Jan. 24, 1978, BGH, 31 NJW 1693 (1979); *see also* Judgment of Dec. 16, 1953, BGH, 5 VERSR 100 (1954) (sufficient circumstantial evidence for a product defect if several people get infected after drinking milk delivered by the same producer). For a detailed discussion, *see* O. DE LOUSANOFF, *FACILITATIONS OF PROOF IN MEDICAL MALPRACTICE CASES, A COMPARATIVE ANALYSIS OF AMERICAN AND GERMAN LAW* 81 (1982).

47. *Cf.* Judgment of June 20, 1978, BGH, 31 NJW 2032 (1978); H. KULLMANN & B. PFISTER, *supra* note 18, ¶ 1526/3 4.

48. *See supra* text section I.B.

49. *See supra* text sections I.A., I.B.1; *cf.* Judgment of Jan. 17, 1984, BGH, 35 VERSR 270 (1984). *But see* H. KULLMANN & B. PFISTER, *supra* note 18, ¶ 1602/15.

50. Judgment of Nov. 26, 1968, BGH, 51 BGHZ 91 (1969).

51. *See supra* text section I.B.2; H. KULLMANN & B. PFISTER, *supra* note 18, B. ¶ 1526/16.

52. *See supra* text section I.B.3.

selected, trained, and supervised in a way that practically excludes the possibility of deviations from the orderly production process by reason of individual mistakes.<sup>53</sup> Such proof is naturally extremely difficult, which warrants the characterization of the present situation as "close-to-strict" liability.

### 3. *Article 4 of the Council Directive*

According to Article 4 of the Council Directive, "the injured person has to prove the damage, the defect and the causal relationship between defect and damage." Under the Council Directive, the plaintiff carries the same burden of proof as under the traditional German tort law. Therefore, the German draft code does not even include a provision corresponding to Article 4.<sup>54</sup>

If the plaintiff succeeds in carrying the burden of proof, the manufacturer has a limited number of excuses under Article 7 of the Council Directive.<sup>55</sup> The manufacturer can be exonerated under Article 7 only by proving: (i) that it did not put the product into circulation (Article 7(a)); (ii) that the defect did not exist at the time when the product was put into circulation (insofar a less strict standard of proof applies (Article 7(b)); (iii) that the product was neither manufactured by it for sale or any form of distribution for economic purposes, nor manufactured or distributed by it in the course of its business (Article 7(c)); or, (iv) in case of a manufacturer of components, that the defect is attributable to the design of the main product or to instructions given by that product's manufacturer (Article 7(f)).<sup>56</sup> While the future impact of subsections (c) and (d) is unclear,<sup>57</sup> the excuses (a), (b), (e), and (f) are already available under present German products liability law.

## D. PERSONS LIABLE

### 1. *Manufacturer of Finished Product and Component Parts*

The question as to what extent a manufacturer is liable for defects of the finished product or of component parts cannot be based on abstract theory. At least under present law, the answer derives from a case-by-case analysis of the respective duties of care on the part of manufacturers of components and finished products. The following principles, therefore,

53. See, e.g., Judgment of June 19, 1973, BGH, 28 BB 1372 (1973); Judgment of Oct. 17, 1967, BGH, 21 NJW 247 (1968).

54. Cf. *supra* note 44 and accompanying text.

55. CD art. 7(d), (e); see *supra* text section I.B.1-2.

56. See *infra* text section I.D.1.

57. See *supra* text section I.B.1 (CD art. 7(d)); cf. J. SCHMIDT-SALZER & H. HOLLMANN, *supra* note 1, at 676-77 (CD art. 7(c)).

should be applied with care and in consideration of the specific circumstances of a given case.

The manufacturer of the finished product is liable for defects of the finished product as a whole.<sup>58</sup> Liability may also stem from defective component parts, if they have been constructed in accordance with the manufacturer's plans and directions, if component parts were not carefully selected, or if the parts were not carefully tested or monitored in the finished product.<sup>59</sup> The dividing line between a manufacturer who is responsible for the design and manufacturing of the finished product as a whole and an assembler who merely combines parts produced by another company into a finished product, has not been drawn by the courts with absolute certainty.<sup>60</sup> In a decision in 1978 dealing with the manufacturer of derricks,<sup>61</sup> the German Federal Supreme Court held that a company that assembles, slightly modifies, and completes prefabricated units, designed and manufactured by a renowned producer, to a finished product is subject only to a reduced duty of care with regard to design and manufacturing of prefabricated units, even if acting as a quasi-manufacturer.

Article 3(1) of the Council Directive, reflected in section 4(1) of the German draft code, subjects manufacturers of finished products and component parts, as well as producers of raw material, equally to products liability. The manufacturer of component parts is liable for defects in the component parts. Naturally, such defects may also be assumed because of insufficient instructions concerning the use and assembly of the component parts in connection with the finished product.<sup>62</sup> However, Article 7(f) of the Council Directive allows the manufacturer of components partial exoneration.<sup>63</sup> In fact, though, this provision merely confirms that a component is not defective within the meaning of Article 6 of the Council Directive if its "deficiency" is attributable to a defect in the finished product<sup>64</sup> or to instructions given by the manufacturer of the finished product.<sup>65</sup> For example, if a car producer equips a car with a maximum speed of 200 km/h with tires designed for a maximum speed of 180 km/h, the car as a whole is defective although the tires alone are perfect.<sup>66</sup>

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58. Cf. Judgment of May 14, 1985, BGH, 38 NJW 2420 (1985); see also H. KULLMANN & B. PFISTER, *supra* note 18, ¶ 3250/3.

59. H. KULLMANN & B. PFISTER, *supra* note 18, ¶ 3250/6-9; see also Judgment of Jan. 18, 1983, BGH, 86 BGHZ 256 (1983); Judgment of May 14, 1985, BGH, 38 NJW 2420 (1985).

60. Cf., e.g., Judgment of June 3, 1975, BGH, 30 BB 1031 (1975), noted by Schmidt-Salzer, *id.* at 1032, and Graf von Westphalen, *id.* at 1033; Judgment of June 14, 1977, BGH, 32 BB 1117 (1977).

61. Judgment of June 14, 1977, BGH, 32 BB 1117 (1977) (expressly limiting the holding of the Judgment of June 3, 1975, BGH, 30 BB 1031 (1975)).

62. See *supra* text section I.B.5.

63. Cf. German draft code § 1(3); see also *supra* note 56 and accompanying text.

64. CD art. 6(1).

65. *Id.* art. 6(2).

66. Example of J. SCHMIDT-SALZER & H. HOLLMANN, *supra* note 1, at 706-07.

## 2. *Quasi-Manufacturer*

At present, the dealer-attached name to products produced by other manufacturers does not, as a general rule, thereby subject the dealer to the special duties of a manufacturer.<sup>67</sup> With regard to quasi-manufacturers who function not only as dealers but who also assemble products of other manufacturers, the question remains unanswered.<sup>68</sup>

The Products Liability Act clearly will be more stringent in this respect. It will also provide for more certainty with regard to quasi-manufacturers. Article 4(1) subjects to products liability standards "any person who, by putting his name, trademark, or other distinguishing feature on the product presents himself as its producer."

## 3. *Dealer and Importer*

As a general rule, a dealer is not subject to products liability in tort under present German law.<sup>69</sup> A dealer normally has no legal duty to control or test products with regard to design or manufacturing defects,<sup>70</sup> except to take such precautions if specific circumstances indicate potential defects, e.g., if the same type of product has already caused damages, or if there are indications that the product may have been damaged during transportation. Also, a dealer with special expertise, such as a franchised car dealer, may have to inspect products more closely. The courts tend to approach these questions on a case-by-case basis.<sup>71</sup>

A dealer-importer faces different standards. A dealer-importer may be subject to duties of care similar to those of a manufacturer, since the imported product may have been manufactured in a country with safety standards different from those applicable under German law. In addition, a claim against a foreign manufacturer is usually more difficult to enforce.<sup>72</sup>

However, the German Federal Supreme Court held that importers selling products produced in *EC Member States*, or at least in one of the original six Member States, will not be treated differently from ordinary dealers selling goods manufactured in Germany.<sup>73</sup> Nevertheless, a careful analysis of this decision, concerning a French bicycle with a defective design, could suggest that even importers of EC products may have to examine the imported goods to some extent. Both dealer-importers and ordinary dealers are not required to examine and test the imported goods

67. Judgment of Dec. 12, 1979, BGH, 33 NJW 1219 (1980).

68. See *supra* text section I.E.1; see also J. SCHMIDT-SALZER & H. HOLLMANN, *supra* note 1, at 366 ff.

69. For contractual liability, see *infra* text section II.

70. Judgment of Dec. 12, 1979, BGH, 33 NJW 1219 (1980). For an overview, see Kossmann, *Der Handel im System der Produkthaftpflicht*, 37 NJW 1664 (1984).

71. See H. KULLMANN & B. PFISTER, *supra* note 18, ¶ 1524/1.

72. See Judgment of Dec. 12, 1979, BGH, 33 NJW 1219, 1220 (1980).

73. *Id.*

with regard to defective design or manufacturing and quality control defects, unless circumstances indicate the existence of such defects. Both types of dealers, however, may be required to check the conformity of the imported goods with technical norms such as DIN.<sup>74</sup> The exact scope of an importer's duty of care was expressly left open by the court. In a recent decision<sup>75</sup> the German Federal Supreme Court once again confirmed that an importer generally is not liable for design, manufacturing, or quality control defects. The Court held, however, that a sole importer entrusted by the manufacturer with product information towards dealers and consumers may be liable for instruction defects and breach of the continuing duty to monitor and warn, to the same extent as the manufacturer.

The Council Directive provides clear criteria with regard to the liability of dealers and importers. According to Article 3(2), apart from the producer, any person will be considered a manufacturer "who imports into the Community a product for sale, hire, leasing, or any form of distribution in the course of his business. . . ." According to Article 3(3) any dealer will be liable under the Council Directive if the manufacturer of the product cannot be identified, and if such dealer cannot inform the injured person within a reasonable time of the identity of the manufacturer or the immediate supplier. With regard to products imported from non-EC countries, this rule also applies if the foreign manufacturer is identified, but the EC-importer remains unknown. The German draft code has adopted these provisions in section 4(1)–(3).

#### 4. *Employees of the Manufacturer*

In a highly debated decision of 1975, the German Federal Supreme Court applied products liability standards to a senior employee of the manufacturer responsible for production planning and supervision.<sup>76</sup> The decision has remained singular and should be read rather narrowly.<sup>77</sup> The decision probably does not indicate a tendency to extend products liability to manufacturers' employees. Under the Council Directive, employees of the manufacturer are not liable.<sup>78</sup>

#### 5. *Persons Entitled to Products Liability Claims*

Products liability claims under present German law, as well as under the Council Directive, are not limited to consumers. The same principles

74. See *supra* text section I.B.1.

75. Judgment of Dec. 12, 1986, BGH, 40 NJW 1009 (1987); cf. *supra* text section I.B.6.

76. Judgment of June 3, 1975, BGH, 30 BB 1031 (1975); see also Thomas, *Commentary*, PALANDT, BGB § 823, annot. 16(D)(c)(ff) (P. Bassenge et al. eds. 47th ed. 1988) (references pro and contra this decision).

77. See Judgment of Oct. 7, 1986, BGH, 42 BB 268, 269–70 (1987).

78. J. SCHMIDT-SALZER & H. HOLLMANN, *supra* note 1, at 306–08.

that consumers rely on also apply with regard to enterprises suffering damages from defective products.

#### E. TYPES AND AMOUNT OF DAMAGES—STANDARDS OF CAUSATION

Provided the statutory requirements of BGB section 823 are met, a products liability claim, like any claim in tort, entitles the successful party to recover economic losses resulting from the defective product; it also covers compensation for pain and suffering.<sup>79</sup> While, in principle, all economic losses that can be established have to be compensated,<sup>80</sup> there may be a tendency to limit recoverable losses in order to avoid incalculable risks for manufacturers.<sup>81</sup> Technically, such a limitation could be effectuated through the application of more refined standards of causation, taking into account the purpose of products liability law, namely the protection of consumers rather than commercial buyers.<sup>82</sup> This question, not yet settled under German law, is of particular importance with regard to enterprises as holders of products liability claims.

The amounts awarded by German courts correspond with European standards and are relatively modest compared with United States practice.<sup>83</sup> Punitive damages are unknown in German tort law, and awards for pain and suffering have remained comparatively low.<sup>84</sup>

Article 9 of the Council Directive limits the types of recoverable damages to (i) damage caused by death or personal injuries; and (ii) damage to, or destruction of, any item or property other than the defective product itself, with a lower threshold of 500 ECU, provided that such item or property is intended for *private* use or consumption or actually used by the injured person mainly for private use or consumption. The German draft code incorporates these provisions in article 1(1).

For example, if a defective oxygen bottle causes damage to a production machine and thereby causes a standstill in production, the harmed enterprise is, under the Council Directive, not entitled to compensation for

79. BGB § 847.

80. *Id.* §§ 249 *et seq.*

81. *Cf.* Mertens, *Commentary*, MÜNCHENER KOMMENTAR, BGB, vol. 3, part 2, § 823 annot. 304 (K. Rebmann, F.J. Saecker eds. 2d ed. 1986).

82. For the various theories aiming at more refined standards of causation, see generally I K. LARENZ, SCHULDRECHT § 27 (III)(b) (14th ed. 1987).

83. *Cf.*, e.g., de Lousanoff, *Theorie und praxis der US-amerikanischen Produzentenhaftung*, 151 ZHR 72, 78 (1987).

84. For a detailed list of amounts awarded by German courts see S. HACKS, A. RING, P. BOHM, SCHMERZENGELD BETRÄGE (12th ed. 1985) (standard manual); see also Lemcke-Schmalzl & Schmalzl, *Tendenzen und Entwicklungen in der neueren Schmerzensgeldrechtsprechung (1982–1984) (I)*, in 39 MONATSSCHRIFT FÜR DEUTSCHES RECHT [MDR] 272, 274 (1985) citing several court decisions awarding up to DM 250,000 as pain and suffering claims for serious personal injuries).

damage to the machine or economic losses caused by the standstill. This differs from German "close-to-strict" liability, which certainly would cover damage to the machine and, in principle, also resulting economic losses. Article 16(1) of the Council Directive allows member states to establish a liability ceiling of at least 70 million ECU. Accordingly, article 10(1) of the German draft code provides for a limit of 160 million DM in case of death or injury of one or more persons caused by one or more identical products with the same defects.<sup>85</sup> Unlimited liability for negligence is likely to remain available under present close-to-strict products liability standards.<sup>86</sup> National provisions concerning "non-material damage," such as pain and suffering in BGB section 847, also remain unaffected,<sup>87</sup> as well as claims of surviving relatives.<sup>88</sup>

#### F. CONTRIBUTORY NEGLIGENCE

Questions of contributory negligence play an important role in products liability litigation. Under present German law as well as under the Council Directive and the German draft code, damages may be reduced, or even disallowed, in case of contributory negligence (*Mitverschulden*) on the part of the injured person or a person, for whom the injured person is responsible;<sup>89</sup> contributory negligence of a third person does not affect the injured person's claim.<sup>90</sup> Nevertheless, the Council Directive does not define the concept of contributory negligence, but implicitly refers to the standards prevailing under the laws of the EC member states.<sup>91</sup>

#### G. STATUTE OF LIMITATION

According to section 852 of the BGB, products liability claims in tort expire in three years. The limitation period, both with regard to present and future damages arising out of an accident, begins to run as soon as

85. Cf. Taschner, *supra* note 1, at 612–13. According to CD art. 16(2), the EC Council and Commission will scrutinize the functioning of the respective national provisions in 1995 and decide whether to repeal CD art. 16(1). Cf. Hollman, *supra* note 31, at 2442.

86. See CD art. 13; J. SCHMIDT-SALZER & H. HOLLMANN, *supra* note 1, at 784–85.

87. CD art. 9; see J. SCHMIDT-SALZER & H. HOLLMANN, *supra* note 1, at 762–64.

88. "Survival type" wrongful death statutes are unknown in German law. Therefore, as a rule, the heirs of a killed person are not entitled to enforce claims for pain and suffering of the decedent (BGB § 847(1)); cf. Judgment of Oct. 4, 1977, BGH, 69 BGHZ 323 (1978); Judgment of October 22, 1985, BGH, 39 NJW 1039 (1986). According to BGB §§ 844, 845, surviving relatives are entitled to compensation for the pecuniary loss sustained by them (wrongful death statutes "true type").

89. BGB § 254; CD art. 8(2); German draft code § 6(1).

90. CD art. 8(1); German draft code § 6(2).

91. Cf. 6(1) of the German draft code, *supra* note 7, which refers to BGB § 254; see also Official Comments, *id.*, at 112, § 2.6.



the injured person becomes aware of any damage and can identify the person liable. In other words, the injured person has to have the information enabling him to ask for at least a declaratory judgment for present and future damages. Similarly, Article 10 of the Council Directive and article 12 of the German draft code provide for a three years' limitation period starting "the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect, and the identity of the producer."<sup>92</sup>

Unlike present law, Article 11 of the Council Directive provides that rights conferred upon the injured person pursuant to the Council Directive shall terminate upon the expiration of a ten-year period starting from the date on which the producer put the actual product into circulation, unless the injured person has tolled the statute by instituting proceedings against the producer.<sup>92</sup>

## II. Liability for Product Deficiencies in Contract Law

### A. LIMITED STATUTORY WARRANTY FOR PRODUCT DEFICIENCIES

Under BGB section 459 the seller of a product by operation of law warrants that the product is free from defects that affect the value of the product or restrict its normal use, i.e., the use as expressly or implicitly contemplated by the contract. In case of such a defect, the definition of which may be broader than the defects necessary for products liability in tort, the buyer may rescind the contract (*Wandelung*) or claim a reduction of the purchase price (*Minderung*). If the product is standardized merchandise the buyer may also demand substitution of other, nondefective products.<sup>93</sup> These rights are independent from any fault on the part of the seller.

### B. DAMAGES FOR BREACH OF CONTRACTUAL DUTY OF CARE

Contracts create supplementary obligations. Generally, the supplier is under a duty to protect and not to cause damage to the person and property of the other party to the contract. For example, if the seller delivers contaminated animal feed, the buyer is entitled to rescission or reduction of the purchase price. If the contaminated animal feed causes the death of the buyer's cattle, the buyer also can claim damages if the seller has breached contractual duties of care.<sup>94</sup> These duties, which have no express statutory basis, by and large parallel the general duty of care under tort

92. German draft code § 13.

93. BGB § 480.

94. Judgment of July 9, 1907, Reichsgericht [RG], 66 RGZ 289 (1907).

law and concern design, manufacturing, and monitoring of the product as well as instructing and warning of the buyer.<sup>95</sup> These contractual duties in principle exist only vis-à-vis the buyer, but they have been extended by the courts to certain third persons close to the buyer such as family members or employees.

Compared with the statutory warranty under section 459 of the BGB, the contractual duty of care encompasses two major differences: liability for breach of a contractual duty of care presupposes fault on the part of the seller, and the buyer is—in addition to the rights under BGB section 459—entitled to damages resulting from such breach.<sup>96</sup> For example, when delivery of a wrong substance causes the buyer to produce a defective product and makes the buyer liable to customers, the original seller must indemnify the buyer.<sup>97</sup> A products liability claim in tort would possibly—under Article 9 of the Council Directive certainly—not cover such losses.<sup>98</sup> Quite similar to products liability law in tort, the breach of a contractual duty of care is presumed once the buyer has proven that the damages were caused by defects in the delivered product.<sup>99</sup>

### C. STRICT LIABILITY FOR BREACH OF CONTRACTUAL WARRANTY OF QUALITY AND PERFORMANCE (*ZUGESICHERTE EIGENSCHAFTEN*)

Contractual liability for defective products is either strictly limited to rescission or reduction of the purchase price, or presupposes negligence. If a seller expressly or implicitly warrants the existence (or knowingly conceals the absence) of certain product characteristics, however, strict contractual liability may arise under BGB sections 459, para. 2, and 463, if such characteristics are missing. Courts have assumed the existence of such a far-reaching warranty only in exceptional cases, however. As a general rule, allegations made only in advertisements are not sufficient for the assumption of a warranty of quality and performance.<sup>100</sup> The seller

95. Cf. *supra* text section I.B.; see also Westermann, *Commentary*, MUENCHENER KOMMENTAR, BGB, vol. 3, part 1, § 463 annot. 31 (K. Rebmann, F. Saecker eds. 1980).

96. Cf. *infra* text section II.C.

97. Judgment of Mark 8, 1967, BGH, 1967 JURISTENZEITUNG [JZ] 321.

98. Cf. *supra* text section I.E.

99. See Heinrichs, *Commentary*, PALANDT, BGB § 282, annot. 2 (P. Bassenge et al. eds. 47th ed. 1988).

100. Judgment of June 21, 1967, BGH, 48 BGHZ 118, 123 (1968). The court held in the same decision, however, that the advertising of a product with a registered trademark can lead to a "warranty of quality and performance" with regard to product characteristics specifically symbolized by the trademark. *Id.* at 123–24; cf. Mueller, *Die haftungsrechtliche Bedeutung des Guetezeichens im Kaufvertrag*, 1987 DB 1521, who assumes a "warranty of quality and performance" if a product carries a certificate of quality (*Gutezeichen*), not, however, in case of a DIN label (cf. *supra* text section I.B.1); see also *supra* text section I.B.5.

has to have warranted the existence of certain characteristics in such a way as reasonably to allow the conclusion that the seller is willing to cover the buyer's damages in case of the absence of such characteristics (*Garantiehaftung*). For example, the German Federal Supreme Court takes the view that the commercial seller of a car implicitly warrants that its tires have the size and consistency required for the specific type of car. As a consequence, if the car sold has the wrong tires and this fact leads to an accident, the seller is liable under BGB sections 459 para. 2, and 463.<sup>101</sup> The liability under BGB sections 459 para. 2, and 463 is strict, i.e., independent from any negligence of the seller. As a consequence, the seller may even be liable for defects such as development risks or run-aways that would not necessarily lead to products liability in tort.<sup>102</sup>

In principle, the seller must compensate the buyer for all damages resulting from the deficiency, i.e., the missing product characteristic warranted by the seller.<sup>103</sup> The extent of such liability and of the damages awarded cannot, however, be defined in general terms but rather depend on how a court interprets the warranty's coverage in a given case.<sup>104</sup> Also, as with tort liability, the use of more refined standards of causation may have a limiting effect.

#### D. PRECLUSION AND STATUTE OF LIMITATION

A merchant buyer is precluded from invoking contractual claims unless the delivered products are immediately examined and any discoverable defects immediately reported to the seller.<sup>105</sup> The limitation period for the buyer's contractual rights is six months starting upon delivery. It elapses even when the defects of the goods delivered could not have been discovered before the end of six months.<sup>106</sup>

### III. Relationship between Products Liability in Tort and Contract Law—Exclusion of Liabilities

The existence of a contractual relationship between the manufacturer of a defective product and the person injured by such a product does not preclude the manufacturer's products liability in tort.<sup>107</sup> However, tort liability as well as contractual liability may to some extent be excluded

101. Judgment of July 5, 1978, BGH, 31 NJW 2241 (1978).

102. See *supra* text section I.B.2.4.

103. BGB §§ 249 *et seq.*

104. Judgment of May 29, 1968, BGH, 50 BGHZ 200, 204–06 (1969).

105. German Commercial Code § 377.

106. BGB § 477.

107. Cf. Judgment of Jan. 18, 1983, BGH, 86 BGHZ 256, 260 (1983).

or limited among the parties to the contract by stipulation.<sup>108</sup> The exclusion of tort liability among parties to the contract can become particularly important because of the different statutes of limitation (six months or three years).<sup>109</sup> Also, only recovery under a products liability claim in tort allows damages for pain and suffering.<sup>110</sup> German law governing the exclusion or limitation of products liability in contract and tort is rather complicated and requires some clarifications at this point.

As a rule, *contractual* liability for product defects may be effectively excluded in an *individual contract*, unless the seller has willfully concealed a defect.<sup>111</sup> In order to exclude damages for the breach of contractual duties of care by a respective contractual clause, they have to be expressly mentioned therein;<sup>112</sup> however, only liability for negligence—not for intent<sup>113</sup>—may be excluded. The exclusion of strict liability for breach of a contractual warranty of quality and performance would be contradictory in itself and is, therefore, generally not possible even in an individual contract.<sup>114</sup> An exclusion clause in *standard terms of adhesion* is void under the German AGB-Gesetz;<sup>115</sup> if and to what extent a limitation of damages for breach of a contractual duty of care is admissible under the AGB-Gesetz has not yet been definitely decided.<sup>116</sup> Tort liability among the parties to the contract will be covered by a contractual exclusion clause only if the clause unequivocally says so.<sup>117</sup> If such is the case, tort liability can be excluded and limited to the extent shown above with regard to contractual liabilities.

As mentioned already, Article 13 of the Council Directive provides that the Council Directive "[s]hall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or [an already existing] special liability system. . . ." This has been adopted in article 15(2) of the German draft code. Therefore, present German "close-to-strict" products liability in tort and products liability in contract law will remain, at least in principle, unaffected. How-

108. See, e.g., Judgment of Nov. 24, 1976, BGH, 67 BGHZ 359, 363, 366-67 (1977).

109. See *supra* text sections I.F, II.D.

110. Cf. BGB §§ 253, 847.

111. *Id.* § 476.

112. Judgment of April 5, 1967, BGH, 47 BGHZ 312, 318 (1967); Westermann *supra* note 95, § 476 annot 17.

113. Cf. BGB § 276, ¶ 2.

114. Putzo, *Commentary*, PALANDT, BGB § 476, annot. 1(a) (P. Bassenge et al. eds. 46th ed. 1987); see also Westermann, *id.* annot. 20.

115. Law Concerning Standard Terms of Contracts (AGB-Gesetz) of Dec. 9, 1976, § 11, nos. 10a, 11, BGBl.I 3317. The AGB-Gesetz also prohibits an exclusion for gross negligence. Cf. § 11, no. 7.

116. See Hensen, *Commentary*, P. ULMER, H.E. BRANDNER, H.D. HENSEN, AGB-Gesetz, § 11, No. 7 annot. 37 (P. Ulmer et al. eds., 5th ed. 1986).

117. Judgment of Nov. 24, 1976, BGB, 67 BGHZ 359, 366-67 (1977).

ever, an important change will be caused by Article 12 of the Council Directive providing that the liability of the producer based on the Council Directive may not be excluded. As shown above, under present German law contractual and tort liability, to some extent, may be excluded or limited among parties to a contract. Products liability based on the Council Directive will not allow such limitations.<sup>118</sup>

#### **IV. Jurisdiction and Applicable Law with Record to Products Liability in Tort**

Tort claims against EC residents must be brought before the courts of a member country in which the damaging event occurred, as provided by Article 5, no. 3 of the European Convention on Jurisdiction and Enforcement in Civil and Commercial Matters of September 27, 1968.<sup>119</sup> The European Court of Justice held that Article 5, no. 3 refers to both the place where the damaging event occurred (accident caused by defective product) and where this event originally was caused (where the defective product was manufactured).<sup>120</sup> German courts are likely to follow this interpretation. The only open question is whether Article 5, no. 3 also refers to places where damages caused by a defective product produce later effects (personal injury caused in state A, loss of job because of invalidity in state B). Good arguments exist for the proposition that Article 5, no. 3 should not be given such a broad reading.<sup>121</sup>

As a rule, German courts will apply either the law of the state where the accident occurred or where it was caused originally, whichever is more favorable to the injured person.<sup>122</sup> The Hague Convention on the Law Applicable to Products Liability of October 21, 1972,<sup>123</sup> providing for a more refined selection of this applicable law (Articles 3–7) has not been ratified by the Federal Republic of Germany.<sup>124</sup>

118. Cf. German draft code § 14; see also J. SCHMIDT-SALZER & H. HOLLMANN, *supra* note 1, at 799.

119. BGBl.II 773 (1972), BGBl.II 60 (1973).

120. Bier/Mines de Potasse d'Alsace, S.A., 1976 E. Comm. Ct. J. Rep. 1735.

121. Cf. J. KROPHOLLER, *EUROPAEISCHES ZIVILPROZESSRECHT* art. 5 annot. 45 (2d ed. 1978).

122. Judgment of June 23, 1964, BGH, 17 NJW 2012 (1964); G. KEGEL, *INTERNATIONALES PRIVATRECHT* § 18(IV)(1)(a) (5th ed. 1985); Kreuzer, *Commentary*, *MUENCHENER KOMMENTAR*, BGB, art. 12 EGBGB annot. 200–03 (K. Rebmann, F.J. Saecker eds. 1983). The draft of the German Ministry of Justice for a new conflict of laws rule concerning tort law provides for a similar, however, more refined rule in Articles 40–42. See the comments of the Max-Planck-Institut, 1985 *GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT INTERNATIONALER TEIL* (GRUR INT.) 104.

123. The text of the Convention is reprinted in 37 *RABELSZ* 594 (1973).

124. Heldrich, *Commentary*, PALANDT, BGB, art. 38 EGBGB annot. 2(c)(cc) (P. Bassenge et al. eds. 47th ed. 1988). For details and further references see G. KEGEL, *supra* note 122, § 18 (IV)(3)(b).

## V. Conclusion—No Revolution, No Uniformity

The Council Directive, at least in Germany, will not cause a revolution in products liability law. Although different from present German law, the Council Directive provides for strict liability with regard to so-called run-aways, i.e., unavoidable manufacturing defects. Article 7(e) of the Council Directive, however, still allows a manufacturer exoneration for so-called "development risks." Different from present German law, Article 3(1) subjects quasi-manufacturers who put their name and trademark on another manufacturer's product, to products liability standards. With regard to dealer-importers, Article 3(2) and (3) provides for more certainty. As for the amount of damages recoverable under the Council Directive, Article 16(1) provides for a liability ceiling of 70 million ECU for damages resulting from death or personal injury, and Article 9(b) limits property damages basically to property used for private purposes. To this extent, the Council Directive is clearly less strict than present German law.

The codification of the Council Directive in the form of the Product Liability Act will not cause a revolution in products liability law, and since present products liability law will not be replaced, but merely supplemented, by the new law, plaintiffs are likely to base their future products liability claims on both the old and the new law. It will be interesting to observe the interaction between the two systems,<sup>125</sup> and to see whether the new law eventually will materially improve the plaintiff's position with regard to substance and procedure.<sup>126</sup> A critical question is to what extent the national provisions implementing the Council Directive, and also their application by the national courts, will provide for uniformity on the EC level.<sup>127</sup> The Council Directive itself leaves the member states various significant options, in particular with regard to:

- liability for development risks (Article 7(e));
- liability for failure to call back;
- standards of proof;
- standards of causation;

125. Cf. *supra* text sections I.B, I.B.6.

126. This article deals primarily with substantive law. As compared with U.S. law, however, German products liability law would affect the manufacturers to a far lesser extent even if the substantive law and the rules governing burden of proof were identical. The reason is procedure: e.g., different standards of pleading, different distribution of procedural costs, no pretrial discovery, and no jury; see J. SCHMIDT-SALZER & H. HOLLMANN, *supra* note 1, at 204–15; Hollmann, *supra* note 31, at 2443.

127. Unlike the European Convention on Jurisdiction (*supra* note 100), where the contracting parties, by virtue of the protocol of June 3, 1979 (O.J. EUR. COMM. (No. L 304) 97 (1979); BGBl.II 846 (1972), BGBl.II 819 (1983)), conferred the competence of final interpretation upon the European Court of Justice, the Council Directive does not contain a corresponding provision. Cf. J. SCHMIDT-SALZER & H. HOLLMANN, *supra* note 1, at 129–33.

- standards of comparative negligence (Article 8(2));
- maximum amount of damages (Article 16(1));
- nonmaterial damages (Article 7);
- claims of surviving relatives;
- products liability on other legal grounds (Article 13).

The effect that these options will have on consumer protection and the functioning of the common market will, to some extent, be subject to review by both the EC Council and Commission in 1995.<sup>128</sup> The various options will to a large extent frustrate the principal objective of the Council Directive, namely the harmonization of products liability standards.<sup>129</sup> The implementation of the Council Directive in 1988 will neither be a plain victory for the consumer movement nor for the supporters of a more uniform European law. It may, nevertheless, mark an important first step towards a uniform products liability law in the common market.<sup>130</sup>

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128. See *supra* note 3 (CD arts. 2, 15(1)(a)); *supra* note 30 (CD arts. 7(e), 15(3)); *supra* note 85 (CD arts. 16(1), (2)).

129. Lorenz, *supra* note 1, at 36–37; Hollmann, *supra* note 31, at 2442, with reference to the comments of the European Council in O.J. EUR. COMM. (No. L 210) 30 (1985).

130. This article was completed in November 1987. Subsequent publications were considered during the publication process up to April 1988.

